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Supreme Court of the United States

OCTOBER TERM, 1995

AMERICAN DEPOSIT CORP. AND
BLACKFEET NATIONAL BANK,

Petitioners,

v.

JAMES W. SCHACHT, ACTING DIRECTOR OF INSURANCE
OF THE STATE OF ILLINOIS,

Respondent.

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For The Seventh Circuit**

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL.,* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the court of appeals erred in permitting a state, under the guise of "regulating the business of insurance," to prevent a national bank from exercising a banking power conferred on the bank by federal law.

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF PETITIONERS

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioner in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The American Bankers Association is the largest national trade association of the commercial banking industry in the United States, representing banks located in each of the fifty states and the District of Columbia, banks of all sizes and both national and state-chartered banks. Assets of ABA member banks comprise over ninety percent of the domestic assets of all commercial banks in the country.

The Association of Banks in Insurance, Inc. ("ABI") is a national trade association of financial institutions with an interest in insurance activities. The ABI was organized to protect and further bank insurance powers. Its members include insurance companies, banks, and bank holding companies owning national and state banks, and other companies engaged in the insurance business.

The Bankers Roundtable is a national association whose membership is open to the nation's 125 largest banking companies, which are represented in the Roundtable by the CEOs and highest officers of the companies. Members hold approximately seventy percent of the country's commercial banking assets, operate in virtually every state and employ almost one million individuals. The mission of the Roundtable is to promote the business of banking, to encourage the development of sound banking and financial policies and practices, and to advocate the interests of its member companies in federal legislative, regulatory and judicial bodies.

The Consumer Bankers Association ("CBA") was founded in 1919 to provide a progressive voice for the retail banking industry. CBA represents approximately 750 federally insured bank and thrift institutions that hold more than eighty percent of all consumer deposits, and more than seventy percent of all consumer credit held by federally insured depository institutions.

The Independent Bankers Association of America is the national trade association that exclusively represents the interests of community banks. Its membership includes nearly 6000 financial institutions in all fifty states and the District of Columbia.

All of the sponsoring associations frequently appear in litigation, either as a party or as amici curiae, in cases raising issues of considerable importance to their respective members. This is such a case for the reasons set forth below.

REASONS FOR GRANTING THE WRIT

This is the Fourth Annual Bankers v. Insurance Industry Turf Battle to be presented to this Court for resolution. Despite decisions rendered by the Court in each of the past three terms, *Barnett Bank of Marion County v. Nelson,* 116 S. Ct. 1103 (1996), *NationsBank v. Variable Annuity Life Insurance Co.*, 115 S. Ct. 810 (1995), and *U.S. National Bank of Oregon v. Independent Insurance Agents of America,* 113 S. Ct. 2173 (1993), questions regarding the roles to be played by those two industries in the nation's economy under existing law remain unsettled. They are

complex and important questions of federal law that have divided the lower courts, making it apparent that the courts, the bar, federal and state regulatory agencies and the two industries still are in desperate need of further guidance that only this Court can supply in a definitive fashion.

1. CONTINUING CONFLICT AMONG THE CIRCUITS

To what extent, if any, can state insurance commissioners interfere with a national bank's exercise of powers granted to it by federal law? A proper analysis of the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), is an important factor in answering that question. The Act protects from "inadvertent" federal preemption those state laws that "regulate the business of insurance" unless the allegedly preempting federal law "specifically relates" to the business of insurance.

In *Owensboro National Bank v. Stephens*, 44 F.3d 388 (6th Cir. 1994), the insurance commissioner of Kentucky asserted jurisdiction to prevent the sale of insurance by national banks. Such sales, as agent, allegedly violated Kentucky's anti-affiliation statutes[1] and, according to the commissioner, those laws bound national banks even though a federal law granted the national banks the right to

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[1] *See* Ky. Rev. Stat. 287.030(4). "Anti-affiliation" statutes in various forms are in effect in approximately 21 states, and generally prohibit or seriously limit the licensing of banks or persons affiliated with banks as insurance agents.

sell insurance. The Sixth Circuit held, nevertheless, that the federal law preempted contrary state law, the McCarran-Ferguson Act notwithstanding. The Kentucky law did not regulate the business of insurance, and was therefore not protected from preemption by McCarran-Ferguson: "Excluding a person from participation in an activity, however, is different from regulating the manner in which the activity is conducted. The former is the regulation of the person; the latter is the regulation of the activity." *Owensboro, id.*, 44 F. 3d at 392.

Almost simultaneously, the Eleventh Circuit, dealing with an all but identical factual situation arising under Florida's anti-affiliation statutes, held that state laws excluding banks from participation in the insurance business did **indeed** "regulate the business of insurance" and that such laws were therefore protected from preemption by McCarran-Ferguson. *Barnett Bank of Marion County v. Gallagher,* 43 F.3d 631 (11th Cir. 1995).

The losing parties in both cases **filed** Petitions for Writ of Certiorari, each citing the obvious conflict between the Sixth and Eleventh Circuit decisions construing the McCarran-Ferguson Act's "regulate the business of insurance" language. Each described at length the importance of having such a conflict resolved, and this Court did indeed grant the Petition of Barnett Bank.

But having granted the Petition, this Court proceeded to resolve the case on grounds unrelated to the asserted conflict between the circuits. Rather than determining which of the two lower courts (if either) had correctly construed the

first prong of the McCarran-Ferguson Act test, the *Barnett Bank* case was resolved on the basis of the **second** prong of the Act: State anti-affiliation statutes were preempted because the federal law in question in the case, 12 U.S.C. § 92, "specifically related" to insurance, and was therefore entitled to preemptive effect **whether or not** the anti-affiliation statutes were deemed to "regulate" the business of insurance. *Barnett Bank of Marion County v. Nelson*, 116 S. Ct. at 1111. A week after the *Barnett* decision, the Petition for Writ of Certiorari was simply denied in the *Owensboro* case. (*Stephens v. Owensboro National Bank*, 116 S. Ct. 1350 (1996).

The conflict in the circuits raised by the *Barnett* and *Owensboro* cases therefore remains unresolved and is presented anew in this case. Here, the applicable federal law is found at Section 24 (Seventh) of 12 U.S.C. Unlike the federal law in question in *Barnett,* it does not mention "insurance" in its text. Consequently, the insurance commissioner of Illinois asserts (and the Seventh Circuit agrees) that he can exclude a person from participation in the activity of selling "insurance"[2] under the guise of "regulating" the business of insurance. Such a view is entirely incompatible with the views of the Sixth Circuit's *Owensboro* decision, but quite compatible with the now-reversed decision of the Eleventh Circuit in *Barnett*.

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[2] Of course, the product that is at issue in this case, a specialized certificate of deposit issued by a national bank and insured by the Federal Deposit Insurance Corporation, is not actually "insurance" at all--more of which below.

The Third and the Eighth Circuits have likewise analyzed the first prong of the McCarran-Ferguson test in a manner that cannot be reconciled with the Seventh Circuit's treatment of the issue in the case below:

In *United Services Automobile Association v. Muir*, 792 F.2d 356 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987), a nationwide insurance underwriter acquired a savings bank in Texas. As a result, the Insurance Commissioner of Pennsylvania sought to compel either a divestiture of the savings bank or a revocation of the company's license to do business in Pennsylvania. Section 641 of the Pennsylvania Insurance Department Act (40 P.S. § 281) prohibited affiliations between insurance companies and financial institutions. USAA filed suit challenging the Commissioner's actions. The district court abstained, concluding that the McCarran-Ferguson Act gave states exclusive control over regulation of the business of insurance.

On appeal, the Third Circuit reversed. Despite the fact that the Pennsylvania anti-affiliation statute was located in the insurance code, the court found that the purpose of the legislation was not to regulate the business of insurance, but rather "to prevent competition between insurers and Pennsylvania financial institutions." *Id.* at 364. Since the **purpose** of the state law, by the very terms of the McCarran-Ferguson Act itself, is a critical factor in determining whether the state law may be insulated from federal preemption, the court found that the McCarran-Ferguson Act did not apply.

The relevant Illinois statute here is to like effect as the Pennsylvania statute in *USAA*. It, too, clearly has the effect, as applied here, of preventing competition between insurers and national banks. But the Seventh Circuit found the purpose of the Illinois statute to be "the protection of residents of [Illinois] against acts by insurers not authorized to do an insurance business in [Illinois]." *American Deposit Corp. v. Schacht*, 84 F.3d 834, 838 (7th Cir. 1996).

In *First National Bank of Eastern Arkansas v. Taylor,* 907 F. 2d 775 (8th Cir.), *cert. denied*, 498 U.S. 972 (1990), the plaintiff national bank offered "debt cancellation contracts" to its borrowers whereby, for a fee paid in advance, the bank agreed to cancel any unpaid balance due on a loan in the event of the borrower's death or disability. Likening the contracts to credit life insurance policies, the Arkansas Insurance Commissioner asserted jurisdiction to regulate the contracts. The court concluded that the bank's activities were authorized by the "incidental powers" clause of the National Bank Act, 12 U.S.C. Section 24 (Seventh), which says absolutely nothing about the business of insurance. That being the case, the court went on to hold in favor of the national bank because "under the principle of federal preemption ... states may neither prohibit nor unduly restrict their activities." *Id.* at 778. State laws regulating the business of insurance were not saved from preemption in that case because debt cancellation contracts, being within the incidental powers of national banks, "do not constitute 'the business of insurance' under the McCarran-Ferguson Act." *Id.* at 779. The court pointed out that "the McCarranFerguson Act was not directed at the activities of national banks, " *id.* and indeed was not directed at any

entity that, at the time of passage of the Act, "was not considered to be engaged in the insurance business" and was "not subject to state insurance laws." "Congress certainly did not intend the definition of 'business of insurance' to be broader than its commonly understood meaning." *Id.* (quoting *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 224-227 (1979)). No one would contend that, prior to the enactment of the McCarran-Ferguson Act, the Illinois Insurance Commissioner would have had any authority to regulate or prohibit the lawful activities of national banks; the Eighth Circuit's decision holds that the McCarran-Ferguson Act was not designed to expand an insurance commissioner's powers in this respect. Yet that is precisely the effect the Seventh Circuit decision will have if it is left unreviewed and unreversed. The views of these two circuits are entirely incompatible.

II. ASSURING CONFORMITY TO BINDING PRECEDENT OF THIS COURT

All of the discussion above assumes, for purposes of argument, that the Petitioners' product, the Retirement CD,[3] is an insurance product. But it is not. At best, it is a product that carries with it certain aspects of an annuity.

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[3] The Retirement CD is a deposit in a bank, insured by the Federal Deposit Insurance Corporation in the same manner and to the same extent as any other deposit. The deposit accumulates interest until the agreed maturity date at which tine the depositor is entitled to receive equal periodic withdrawals for life. *See* Petition for Writ of Certiorari at 2.

Two decisions of this Court, over thirty-five years apart, but both involving the same "insurance" company, when read together, establish that annuities are not insurance products for purposes relevant to this case. The failure of the court below to have applied those precedents to this case is additional cause for this Court to grant review. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, *Supreme Court Practice* 174 (7th ed. 1993).

In *Securities and Exchange Commission v. Variable Annuity Life Insurance Company,* 359 U.S. 65 (1959), the Court dealt with a variable annuity product. The Securities and Exchange Commission sought to regulate the product and its issuer under the provisions of the Securities Act of 1933 and the Investment Company Act of 1940. The Variable Annuity Life Insurance Company ("VALIC") which--like the Bank in this case--was the issuer of the product, resisted the effort on two grounds: first of all, there were specific exemptions in the Securities Act and the Investment Company Act for insurance companies and insurance products; second, even if those federal laws applied to VALIC on their faces, the securities laws conflicted in some respects with state insurance laws, and those state laws would necessarily have priority under the terms of the McCarran-Ferguson Act. This Court rejected both arguments.

Justice Douglas' majority opinion acknowledged that "[r]espondents are regulated under the insurance laws of the District of Columbia and several other States. It is argued that that fact brings into play the provisions of the

McCarran-Ferguson Act." *Id.* at 67. The opinion goes on to state that "[t]he question common to the exemption provisions of the Securities Act and the Investment Company Act **and to § 2(b) of the McCarran-Ferguson Act** is whether respondents are issuing contracts of insurance." *Id.* at 68 (emphasis added). The Court resolved that question by holding that "how the States may have ruled is not decisive. For, as we have said, the meaning of 'insurance' or 'annuity' under these Federal Acts is a federal question." *Id.* at 69. The Court then analyzed the manner in which the annuities in question operated in fact, and ended up determining that" [t]here is no true underwriting of risks, the one earmark of insurance as it has commonly been conceived of in popular understanding and usage." *Id.* at 73. In short, this Court held, explicitly **for the purposes of the McCarran-Ferguson Act,** that variable annuities were **not** insurance products, regardless of what state laws said on the subject. The Seventh Circuit, however, concluded in the case below that the Retirement CD was a "fixed rate annuity," and therefore this Court's *SEC v. VALIC* decision somehow did not count. *American Deposit Corp. v. Schacht*, 84 F.3d at 841.

In *NationsBank v. VALIC*, 115 S. Ct. 810 (1995), however, this Court has had occasion to consider both fixed and variable rate annuities in determining whether their sales by a national bank to its customers was within the "incidental powers" of national banks under Section 24 (Seventh) of the National Bank Act. In the course of answering that question in the affirmative, the Court made it very clear that it understood both fixed and variable rate annuities were at

issue in the case[4] and yet it chose to equate the two for purposes of resolving the legal issues involved in the case: "By providing customers with the opportunity to invest in one or more annuity options, banks are essentially offering financial investment instruments of the kind congressional authorization permits them to broker. *NationsBank v. VALIC, supra*. at 815.

The obvious conclusion to be drawn from reading the two *VALIC* cases together may be stated as a simple syllogism: Variable annuities are not insurance products for purposes of the McCarran-Ferguson Act according to the *1959 VALIC* decision; variable annuities do not differ legally from fixed annuities according to the 1995 *VALIC* decision; ergo, fixed annuities are not insurance products for purposes of the McCarran-Ferguson Act either.

Since neither form of annuity is an insurance product for purposes of the McCarran-Ferguson Act, and that Act is limited in its effect to "the business of insurance," the Seventh Circuit has acted inconsistently with this Court's precedent in absolving Illinois' laws, on McCarran-Ferguson Act grounds, from the ordinary rules of federal preemption set forth by this Court last term in *Barnett Bank of Marion County v. Nelson*, 116 S. Ct . at 1107-1109.

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[4] *See, e.g., NationsBank, supra*, at 816 ("Many annuities currently available, both fixed and variable, do not feature a life term.")

CONCLUSION

Because there is a continuing conflict among the circuits on an issue of federal law that this Court has felt to be of sufficient importance to have granted certiorari in similar cases in the recent past, and because the Seventh Circuit's decision in the case below represents a serious departure from this Court's precedents on that important question of federal law, your amici respectfully urge that the Court grant the petition for writ of certiorari.

Respectfully submitted,

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